Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

**October Term, 1979**

**No. 79-1215**

SAMUEL LEIFER,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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APPENDIX

Transcript of argument, Supreme Court of the State of New York, County of Kings (relevant portion) dated April 28, 1978

Judgment of Conviction dated April 26, 1979

Order affirming Judgment of Conviction dated September 24, 1979

Certificate Denying Leave to Appeal to the Court of Appeals dated November 9, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1979

No.

SAMUEL LEIFER,

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v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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The petitioner, Samuel Leifer, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this proceeding on November 9, 1979.

## OPINIONS BELOW

No court filed a formal opinion.

## JURISDICTION

Leave to appeal was denied by the Court of Appeals on November 9, 1979. Reproduced in the appendix hereto are the relevant portions of the argument in the trial court, the Supreme Court of the State of New York, Kings County, its order, the order of the Appellate Division, Second Department, affirming without opinion and the certificate of the Court of Appeals denying leave to appeal. This petition is filed within 90 days after denial of leave to appeal. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

Where an individual has been indicted only for misdemeanors may he, consonant with his rights guaranteed by



the First, Fifth and Fourteenth Amendments, be reindicted for felonies, which are based on the same conduct and on evidence which had been secured by the prosecutor and grand jury through subpoena before the filing of the misdemeanor indictment, because he refused on religious grounds to become an informant. Alternatively, did the courts below err in failing to hold a hearing on the issue of whether petitioner's reindictment was motivated by the prosecution's desire to punish him for refusing to cooperate.

Whether the coercion of consent to the secret recording of conversations requires suppression under 18 U.S.C. §2510 et seq. and the Fourth and Fourteenth Amendments of the Constitution. Alternatively, whether the burden of showing the voluntariness of the consent is on the

prosecution upon the defendant's showing of a likelihood of coercion and whether a hearing is required.

Whether, where the fruits of illegal electronic surveillance are used to secure a search warrant and an indictment, the fruits of the search must be suppressed and the indictment quashed.

Whether the failure to announce one's purpose and authority before executing a search warrant requires suppression of the fruits thereof.



## STATEMENT OF FACTS

### A. The Investigation

During 1975 or 1976 the Office of the Special Prosecutor secured evidence of illegal rebates being paid to nursing home operators by Samuel Frohlich and Norman Newell, owners of a dairy and grocery wholesale establishment known as Frohlich & Newell, Inc. Newell was called before a state grand jury where he perjured himself. Later Newell and Frohlich were confronted with Newell's perjury and threatened with prosecution and possible jail. Newell had a retarded child and greatly feared for him if jailed. Following these threats Newell and Frohlich began to "cooperate" with the Special Prosecutor and "consented"

to allow the electronic recording of their conversations with nursing home operators.*

Petitioner, a partner in River Manor Health Related Facility ("River Manor"), was one of those whose voice was secretly recorded by Frohlich and Newell receiving and discussing illegal rebates. This evidence was used to secure a search warrant and an indictment.

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*The facts showing the coercion were first developed after denial of petitioner's motion to suppress the recordings of his voice. However, they were presented to the Appellate Division which had the power to consider them. On his motion to suppress petitioner was only able to allege such coercive tactics based upon his belief, because he had no way of ascertaining what had actually transpired.



B. The Original Indictment

On November 9, 1976 a 19 count indictment was filed against petitioner, charging 19 separate rebates (each a misdemeanor) in violation of the Public Health Law, (Kings Co. Ind. No. 3259/76). An arrest warrant was secured that day.

C. Defendant's Arrest and Search

Two days later and before executing the arrest warrant, the Special Prosecutor secured a search warrant based on the intercepted conversations. On November 12, 1976, investigators of the Special Prosecutor's office rushed into the facility past the receptionist without announcing their

purpose, located petitioner in the general office, and forced him into his office which was located a few doors away. Then, without exhibiting their warrants they arrested petitioner and searched him and his office, seizing evidence, including an alleged "kickback book".

D. Aborted Plea Negotiations

Thereafter, there were plea negotiations between the office of Special Prosecutor and defense counsel. It was made clear by the Special Prosecutor that petitioner could dispose of the charges by a misdemeanor plea and no jail sentence, if he cooperated in their investigation. After defense counsel advised that petitioner's religious convictions precluded such cooperation, the Special Prosecutor made



it clear that a new indictment would be sought charging petitioner with the felonies for filing false instruments and falsifying his business records.

E. The Superseding Indictment

The superseding indictment (Kings Co. Sup. Ct. Ind. No. 3412/77) added one misdemeanor rebate count to the existing 19 and charged a variety of felony counts which necessarily grew out of the rebate scheme, to wit, falsifying business records (16 counts), offering a false instrument for filing (one count), attempted grand larceny (one count) as well as two income tax related counts, one charging attempted evasion as a misdemeanor and the other

charging that the return was a false instrument, a felony. All of the evidence necessary to secure the felony indictment, namely petitioner's business records, had been secured through the use of grand jury subpoenas before the misdemeanor indictment was handed up.

F. Petitioner's Pretrial Motions

Petitioner sought dismissal of the superseding indictment on the grounds that it violated his constitutional rights because it was brought to punish him for refusing to become an informant. He also sought suppression of his recorded statements on the ground that they were secured through unlawful electronic surveillance and because of the manner of execution.



The motions were denied from the bench without a hearing.

G. The Plea

Petitioner thereafter pleaded guilty reserving his right to appeal denial of the above rulings. He received a six month jail sentence which he is serving and a $20,000 fine. His conviction was affirmed without opinion by the Appeallate Division of September 24, 1979 and on November 9, 1979 the Court of Appeals denied leave to appeal.

## REASONS FOR GRANTING THE WRIT

### I

The decision below conflicts with decisions of this Court which hold it "patently unconstitutional" to penalize a defendant for reliance upon his constitutional rights.

This Court has made it clear that an accused must not be penalized for asserting his constitutional rights. North Carolina v. Pearce, 395 U.S. 711 (1969); Blackledge v. Perry, 417 U.S.21 (1974). In Bordenkircher v. Hayes, 434 U.S. 357 (1978), although allowing prosecution for more serious charges after a defendant's refusal to plead guilty, this Court made it clear that



> "[F]or an agent of the State to pursue a course of action whose object is to penalize a person's reliance on his constitutional rights is 'patently unconstitutional.'" 434 U.S. at 363.

Bordenkircher, which only involved the practical give and take in simple plea bargaining, specifically recognized that the result would be different where the rights of others, as by requiring one to become an informant, were involved (434 U.S. at 364 fn.):

> "This case does not involve the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person other than the accused, see ALI Model Code of Pre-Arraignment Procedure, Commentary to 350.3, pp. 614-615 (1975), which might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider. Cf. Brady v. United States, 397 U.S. 742,758." 434 U.S. at 364.

This case is made more compelling for review because petitioner's refusal to cooperate is based upon his religious conviction, thus implicating his First Amendment rights, as well as his abhorance of informers developed during his horrible experience as a prisoner of a Nazi concentration camp.

The Sixth Circuit recently recognized that even less severe prosecutional vindictiveness from here present might result in dismissal of an indictment. United States v. Andrews, ___F.2d___(6th Cir. 1979), 26 Crim. L. Rept's 2341 (January 23, 1980)(reversing a dismissal for further consideration under appropriate standards).

This question is timely. The Court recently granted certiorari in Roberts v. United States (No. 78-1793)



in which the issue is whether a defendant may receive a greater sentence for his refusal to cooperate with the prosecution. Here the issue is whether he may be reindicted for more serious crimes (misdemeanors raised to felonies on the same conduct) for refusal to become an informer.

## II

The placement of the burden of proving the voluntariness of consensual electronic surveillance is an important constitutional issue.

Petitioner's voice was secretly recorded with electronic devices. The recordings were made without petitioner's consent and without court order. Thus, the evidence

was seized unlawfully under 18 U.S.C. §2510 et seq. and must be suppressed, unless the recording was made with the consent of one of the parties to the conversation. 18 U.S.C. §2511(c).

Suppression was denied in the trial court without a hearing although petitioner stated his belief that the consent was involuntary. The Court was of the view that petitioner had not established facts sufficient to justify a hearing. The informants were entirely within the control of the prosecution. Accordingly, it was impossible for petitioner to obtain



detailed evidence of coercion at that time.* Thus, the denial of a hearing has effectively precluded the litigation of the constitutional threshold to admissibility. This problem is common to virtually every accused whose conversations have been recorded by a government informant.

The issues raised by this petition are: who has the burden of establishing that such "consent" is voluntary and what facts must be shown by a defendant to place such burden on the government. This issue is of great importance to both law

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*Further proof of coercion developed through petitioner's continued investigations which was not available when the motion was made was placed before the Appellate Division.

enforcement and citizens. Petitioner has found no decision in this Court resolving this issue. See Carr, The Law of Electronic Surveillance, pp. 97-98 (Clark Boardman Co., Ltd., 1977).

There are analogies which mandate placing the burden on the government. For example, the government is required to prove the voluntariness of a confession. It must also establish that the accused waived his right to remain silent and be represented by counsel during interrogation. Likewise, the government must prove that an out-of-court identification is proper and does not taint the witness' ability to make an in-court identification. And upon the introduction of evidence tending to cast doubt upon a defendant's sanity,



the burden of proving sanity is likewise placed upon the government.

Where, as here, a defendant has made a showing that the consent may have been coerced, the government, because it has virtually total control over its reluctant informant, should be made to shoulder this burden. The ever increasing reliance on informants who "consent" to interception of their conversations, makes this an appropriate time for this Court to settle this important constitutional issue.

III

The use of illegal electronic surveillance to secure a search warrant, evidence and an indictment violates petitioner's privacy rights guaranteed

by the Fourth and Fourteenth Amendments and 18 U.S.C. §2510 et seq.

If, as urged in Point II, supra, petitioner's voice was intercepted and recorded in violation of his constitutional and statutory privacy rights, the fruits of such unlawful activity must be suppressed under well established law. E.g., Katz v. United States, 389 U.S. 347 (1967); 18 U.S.C. §2515.

IV

The necessity for notice before execution of a search warrant is an important constitutional question never definitively resolved by this Court.



Petitioner was seized by the arresting officers in the general office of his place of business. These officers, who rushed past the receptionist without announcing their purpose or authority, had arrest and search warrants. They never displayed their warrants to petitioner, whom they forcibly took from the general office to his own office, where they conducted their search.

The knock and notice doctrine is of ancient origin. See 2 LaFave, Search and Seizure §4.8 at 122. However, petitioner has found no definitive holding by this Court in the case of the execution of a search warrant Compare Ker v. California, 374 U.S. 23 (1963)(dealing with arrests).

Moreover, none of the recognized exceptions to the warrant requirement, e.g., exigent circumstances, are present here.

This case presents an opportunity to resolve this important question.

## CONCLUSION

For these reasons, a writ of certiorari should be issued.

February 6,1980

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS:CRIMINAL TERM: PART 37

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

SAMUEL LEIFER,
Defendant.

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IND. #3412/77 (Supersedes #3259/76)

Brooklyn, New York
April 28, 1978

B E F O R E :

HON. SYBIL HART KOOPER,
Justice.

A P P E A R A N C E S :

CHARLES J. HYNES, ESQ.,
Deputy Attorney General
BY: FRANK MARINE, ESQ., and
ROBERT DUBLIRER, ESQ.,
Special Assistant Attorneys General
Appearing for the People

MAX WILD, ESQ., and
TONI ROBINSON, ESQ.,
Attorneys for the Defendant

JOSEPH L. BROWNSTEIN, C.S.R.
SALVATORE BASILE
Official Court Reporters

because they had no -- I think they put money, handed money to Mr. Leifer so they could arrest him within minutes in possession of that money. I think they were attempting to gain hard evidence as well as the statements. So it's really, under Mr. Marine's theory, this could have been going on for another six months. They could have kept the indictment sealed, maybe we don't have enough to prosecute, but we will go on for another six months, going on with this practice, and there simply was no need for it and I think it's not only a question of constitutional law but I think the Court has the power to administer justice in its own court and to dismiss indictments where the practices and procedures --

THE COURT: It's dismissed counts.

MR. WILD: Counts. Your Honor, I equivocate the indictment with each --

THE COURT: I should like to reserve on this one, gentlemen.

MR. WILD: Fine. If Your Honor please, I would like to turn to that portion of the omnibus motion which seeks the dismissal of the



entire indictment on two grounds: One is the defectiveness on the prosecution of Mr. Leifer fo r refusing to cooperate and going to trial, and the abuse of the grand jury process.

THE COURT: Well, with regard to the first, since -- is it Burke?

MR. MARINE: Borden, Kirscher v. Hayes.

THE COURT: Since that case came down I am firmly convinced that a prosecutor, assuming arguendo they did what you said they did, they used the superseding indictment in a punitive manner -- I don't assume that, but, I don't say that was the case, but assuming arguendo that it is, the case seems to say that a prosecutor has it within his right to apply pressure and to retaliate, if the pressure isn't successful, the prosecutor, not the Court. I have noticed appearing before me district attorneys plea bargaining stages which have changed since that case came down, and I see no objection to it in line with that case.

MR. WILD: May I respond?

THE COURT: Yes.

MR WILD: First of all, respectfully, I

submitted last night a supplement --

THE COURT: I read it this morning.

MR. WILD: The reason was to bring to Your Honor's attention Justice Dontzin's recent decision in the Carrentito case. In that case he holds the vindictiveness even after the Borden Kirscher and he cites Borden Kirscher in his opinion, would be a basis for overturning of the indictment.

THE COURT: Of course, the prosecutor has another argument, namely, at the time the felony indictment was found to be material it was not in his possession when the original indictment was returned.

MR. WILD: That's a different question, Your Honor. I will address that, if I can, in just a moment because I wanted to address Borden Kirscher and I will come back to that other aspect because that ties --

THE COURT: Let's keep in mind, that, as you have told me before, when I mentioned Judge Balbach --

MR. WILD: I understand that, and I don't



think either binds you, but it certainly is something that Your Honor should be aware of and I think the rationale is sound. First of all, Borden Kirscher is a 5 to 4 decision --

THE COURT: It's the law --

MR. WILD: It represents the interpretation of the Supreme Court of the United States, about the federal constitution. Our motion is founded not only on the federal constitution but on the state constitution and it also calls upon the Court to exercise its power to supervise the administration of justice. I don't think that's binding upon Your Honor. Secondly, Borden Kirscher is distinguishable because in the Borden Kirscher it was, that case on its facts was limited to a defendant who elected to prosecute his rights by going to trial. In this case, it did not involve the defendant who was asked as part of his consideration for a plea to assist or cooperate or give testimony. So Borden Kirscher is on its facts quite distinguishable and I have a feeling that it might have swung the other direction had it been a case in which some sort of activity, in

addition to a plea, would have been required from Borden Kirschner.

THE COURT: To the extent that I participat with prior attorneys and the prosecutor in plea negotiations with this particular defendant, I heard no threats.

MR. WILD: Well, in the sense of a threat --

THE COURT: Of course, I hate to be a witness and I'm not a witness, but I will tell you that prior to your entry into this case, other attorneys did discuss plea negotiations in my presence, obviously.

MR. WILD: As did I, Your Honor.

THE COURT: As did you. At all times I think cooperation was requested. I never heard the prosecutor say if you don't, nor did you, I'm sure, if you don't, we'll go after you with a felony indictment.

MR. WILD: Well, there are different ways.

THE COURT: You feel it was implicit?

MR. WILD: I think so, Your Honor. I don't think you have to say that out loud and I'



think that everybody knows that the club is there. The problem here is there's a problem which is of the prosecutor's own creation and that's one of the reasons for my reply, not the supplement, in the reply memorandum, and this brings us again to the questionof the evidence which the prosecutor says was not before him and also the grounds on which we moved to dismiss it is because we thought the grand jury processes sort of dovetails straight together. In our rep ly memorandum I have annexed two newspaper articles.

THE COURT: I saw them.

MR. WILD: Okay. Now, these articles simply recite a huge roundup and the huge publicity --

THE COURT: Do you feel in an effort to seek immediate publicity with a substantial number of defendants, the prosecutor elected to go with what he had or elected to get a quick indictment on a misdemeanor rather than wait and procure a felony indictment?

MR. WILD: That's one thing. Another thing is, Your Honor, it's quite possible the

grand jury, because of the fact that Mr. Leifer has never cheated the state out of a penny with respect to these alleged kickbacks, because the prosecution also admitted and acknowledged not one penny of the alleged result, independent of the reimbursement, it may have been the grand jury returned the initial indictment because that's all they were going to indict him for.

THE COURT: Do you want to answer that? Are you going to move on to something else?

MR. WILD: Yes, I was going to. It's part of that same argument.

THE COURT: All right, go ahead.

MR. WILD: It brings us back to the question of the abuse of the grand jury process, Mr. Marine's allegation that not all of the evidence was there, and Your Honor's inquiry on that very point.

There's no doubt, Mr. Marine I think would dispute it, that these cases, if somebody accepts a kickback, a whole panacea of types of charges, and out of that it's reasonable to accept they're getting kickbacks, the books are going to be



reflecting the kickback -- by not disclosing it, that reports are going to be filed which are going to carry that forth. What I'm saying is that at the time they know a kickback scheme is going on, they know at the same time there's going to be reimbursement for the kickback. That's the whole nature of that operation. Your Honor is familiar.

But my point is that Mr. Marine's office was aware of that, too, and that's why they subpoenaed the books and records and the books and records were in fact delivered to Mr. Marine's office at that time. My point, Mr. Marine can only say that there were -- no, to copies of certain of the books and records rather than the originals, I don't know if there is any legal significance. Number two, when Mr. Marine asked for the originals, the originals were produced. If the originals weren't in existence, certainly the photocopies would have been the best -- that could have gone to the grand jury. What happened is what Your Honor indicated, and as I have urged myself, that the desire to get publicity --

THE COURT: No, no, I didn't indicate that. That was your argument.

MR. WILD: That's right. Well, in any event, what I am saying here is I think it's a reasonable conclusion that the desire of the Special Prosecutor who knows he's an elected official, to obtain publicity which is important to the continuation of his office and his funding, overrode the judgment here and maybe the grand jury thought Mr. Leifer should have been indicted for a misdemeanor because he didn't realize any gain and it may be that the grand jury was precluded because of a rush for publicity. In either event, I think that going ahead with putting in the other evidence which was already before the grand jury on the supplement is in essence a, a clear case of using the grand jury to bolster the existing indictment, and the superseding indictment was brought in part to gather further evidence and also to punish Mr. Leifer for not cooperating, and that's my motion.

Mr. Leifer was indicted in '75 initially and it was not until — excuse me, '76, and it was not until a few months ago that the superseding



indictment was there and all of the evidence was with the Special Prosecutor. I don't know about the witnesses but certainly the evidence was necessary to establish probable cause.

MR. MARINE: Counsel's statement that whenever you have a kickback scheme, you know that the records are going to be falsified to carry through the kickback and that the MR-2-P would be similarly as falsified is about the clearest concession of his client's intent to defraud that I could conjure up, so I think we should keep that in mind when we get to some of the other issues of Mr. Leifer's attempt to defraud.

But going back to the Borden Kirscher vs. Hayes case, in that case the prosecutor conceded that at the time he brought the lesser charge he had enough evidence to bring the more serious charge of a multiple felony offender, but he declined to do so and he further conceded that the sole purpose of bringing the more serious charge was to induce the defendant to give up his constitutional rights to a jury trial and to give

up his constitutional right to cross examine the witnesses against him.

THE COURT: And the Supreme Court said okay.

MR. MARINS: Yes. So if we assume that the Special Prosecutor had all the evidence it needed to return the superseding indictment, at the time it first indicted Mr. Leifer for a misdemeanor sought the grand jury's indictment of Mr. Leifer for misdemeanors, it makes no difference because Borden Kirscher controls that.

Secondly, it is in the essence of a plea bargain that the prosecutor, if you will, threatened, if you want to use this kind of terminology, says look, you don't give up your right to go to trial, if you don't give up your right to cross examine the witnesses, we will prosecute you to the fullest extent, we can, and seek the most serious charge. That's what a plea bargain is all about, and in recognition of the necessities of a plea bargain, the Supreme Court has recognized its proper and is constitutional, sanctioned to condition a plea upon a threat, if



you will, of more serious consequences.

But that wasn't even done here, also because I don't think counsel will dispute, nor will his previous attorneys that represented Mr. Leifer, dispute that they initiated all the plea bargaining. We didn't, we never went to Mr. Leifer and said we want you to plead guilty, give up your rights. They came to us and said, please, what can we do to resolve this issue? What would you take to allow him to plead guilty? They initiated it. Now, they turn around and say because we did mention that we were interested in obtaining cooperation, that somehow when they asked us what we wanted, our giving them an answer violated their client's rights.

Even after Mr. Leifer was indicted on the superseding charges, counsel had a meeting with the Special Prosecutor in which they initiated all of the attempts to induce us to take a plea. We did not initiate plea negotiations with the defendant. So that I really think it is an unfair argument to make that we sought to punish the defendant for exercising his rights.

I would certainly concede that we were interested in obtaining his cooperation and we still are, and I can't think of a theory of law that would say that a prosecutor may not attempt to get someone's cooperation to uncover other criminals. It is done every day in every court in this country and it's an absolutely essential tool of law enforcement.

I think I will rely on the brief as to our showing that we did not have sufficient evidence to return the felony indictments at the time we returned the misdemeanors because in addition to the books and records there were many other, other witnesses whose testimony was necessary, all the various tax records, and I think the grand jury's records and the proceedings concerning motions made by several witnesses that delayed our grand jury presentment which I think was responsible in part for the delay.

THE COURT: Yes, it took up three volumes, the subsequent minutes. There was a great deal of additional evidence.

MR. WILD: I appreciate that but what I



am saying is that the evidence was either in the possession and control of the Special Prosecutor at the time that he elected to have the grand jury vote an indictment which is just a misdemeanor, or alternatively what I am saying is he should not have cut off the proceedings of that original grand jury.

THE COURT: In any event, I feel your application should be denied. I do not believe that it was a punitive action taken on the part of the prosecutor and your application on that basis is denied. I think he acted properly.

MR. WILD: Then there are just two points I would like to deal with, and one of them is the admissibility of the tape recordings, it's undisputed, and whatever was overheard --

THE COURT: I cannot understand your reason in the briefs with regard to the court order.

MR. WILD: Okay.

THE COURT: I am confused on it.

MR. WILD: Judge, let me see if I can do it quickly. It's electronic surveillance, unless one

of the parties consents --

THE COURT: Accepted, the party did consent.

MR. WILD: Well, that's the issue which I say is presented to the Court, whether in fact they --

THE COURT: You are saying they were coerced by threats?

MR. WILD: That's correct, Your Honor.

THE COURT: That application is denied.

MR. WILD: I think I was going to suggest, Your Honor, that a hearing is the appropriate method for determining --

THE COURT: Or else testimony of which the Court has read regarding their willingness to partake of the conversation.

MR. WILD: Of course, that hasn't been tested by cross examination which would take place at a hearing.

THE COURT: That is your opportunity at trial.

MR. WILD: So then if -- it's Your Honor's ruling it's denied with leave to renew at trial?



THE COURT: You can always cross examine at trial with regard to whether they were coerced into doing this, but all the evidence which I have seen in this case and testimony which I have read, indicates to me that the people who cooperated with the Special Prosecutor did so voluntarily. Perhaps, had they not, they might have been subject to certain sanctions with regard to their own behavior, perhaps, but they had a choice just as Mr. Leifer has had a choice from the beginning of this case. They had acholce. They elected on advice of counsel.

MR. WILD: Well, all I can say, Your Honor, is that many pleas of guilty have been either withdrawn or overturned.

THE COURT: Maybe you will have that on the stand, maybe they will say this tape device, this Nagra, was forced upon my body and maybe they will say I never wanted to do it, but they told me they would put me in the electric chair if I didn't, I don't know. I am telling you that everything I have read indicates a complete knowingness on their part, participated in these conversations

and offered to wear a recording device.

MR. WILD: My concern is that if -- the trial is obviously the least fairest forum for the defendant. The cross examination is the --

THE COURT: It doesn't give you two bites of the apple, you're right to that extent, it's the least, you have to save your cross examination and confrontation of witnesses for trial rather than pre-trial.

MR. WILD: If Your Honor denied the motion at this point and said there should be a hearing immediately preceding the trial, that would be a way of at least sterilizing the proceeding. To conduct a discovery proceeding at a trial, in essence is what a hearing is, is really very unfair.

THE COURT: I hate to usurp judge Donnelly's function. I am telling you at this point that I am denying -- you can have leave to renew in front of Judge Donnelly.

MR. WILD: Fine.

MR. MARINE: Your Honor, we are dealing with an omnibus motion and part of the motion is



a motion to suppress. The C.P.L. outlines the procedure for that motion. Once it's denied, unless there is an uncovery of evidence not available to the person making the motion, at the time he made the motion, that decision stands. It's for an appellate court to reconsider or to review the propriety of that decision. Here we will be having -- they could make amotion to supppress everything all over again.

THE COURT: I am denying it at this time. If he wishes, with regard to this particular item, to bring it to Judge Donnelly -- no, I don't think that's proper. I think you are right. I think you are right. I am denying it. Everything that's been presented to me, and there's no evidence to the contrary whatever, except mere speculation, everything that's been presented to me indicates that the special agents, as you call them, informants, whatever, voluntarily participated in this matter. I have not the slightest indication that their cooperation was less than voluntary. The fact that they were faced with hard choices, people are facing every day.

MR. WILD: I appreciate that but sometimes your will is overborne by what you are supposed to --

THE COURT: Doing this, getting yourself outfitted with a Nagra isn't a permanent situation, something is placed on your body, it's tested, instructions are given, there is a longer period here.

MR. WILD: I understand that, Judge, but the question is it's overborne in the first instance.

THE COURT: I think that's a proper subject and I adhere to my original decision. I think that's a proper subject for cross examination.

MR. WILD: I agree it's proper for cross, but I don't see how -- it seems to me we shouldn't be precluded from exploring that issue on these facts.

MR. MARINE: You have explored it. You made a motion. You have that burden on a motion to suppress to --

THE COURT: You have to give me -- you can't just say they were a Nagra and because they



were a Nagra they were unwilling and it should be suppressed. I am saying there is a great deal of evidence to the contrary. Off the record.

(Discussion off the record.)

(Joseph L. Brownstein, C.S.R. the court reporter at this time.)

MR. WILD: Your Honor, I have a couple of points to argue and then I would ask Mrs. Robinson to address herself to the Court.

THE COURT: She will talk about the pleadings?

MR. WILD: Yes, and the discovery.

Your Honor, one aspect, and perhaps with the time of year, what makes this case different from all other cases? It really is one salient aspect, and that is I think the question of Sciento, which cuts through the whole case and deals with the statutes involved. It seems to me it is beyond dispute, and it has been conceded that Mr. Leifer did never receive one penny of reimbursement from the state. There appears to be some dispute in Mr. Marine's answering papers as to whether he could -- the answeering papers are, as Your Honor pointed out, my judgment, nothing but an --

THE COURT: Let's get it here. Do you have that then, prior to the testimony of the witness even on direct —

MR. MARINE: Yes, prior to the direct, of course.

THE COURT: Okay.

(Whereupon, the Court conducted other Court business and returned to the proceeding.)

THE COURT: All right. Are you finished?

MRS. ROBINSON: Yes. May I have another minute to confer?

THE COURT: Surely.

(Whereupon, Mrs. Robinson conferred with co-counsel.)

THE COURT: I reserved on one and I want to go into it.

MR. MARINE: There are several other matter that were taken up in the briefs that none of us have touched on, that being the search warrant which has been appended to their papers as an exhibit.

THE COURT: Do you want me to take up the search warrant? Is there any reason why I should





MR. WILD: We just —

MR. MARINE: You made the motion.

MR. WILD: I made the motion but I wasn't going to argue this orally.

THE COURT: All right, with regard to the search warrant I find it was validly issued.

MR. WILD: Our thrust was that the evidence upon which it was based was an illegal search.

THE COURT: The evidence came from the tape recordings and that goes back to our previous argument.

MR. WILD: Yes.

THE COURT: And I find that these instruments were not appended to the body of the people to whom they were appended through force and duress.

MR. MARINE: So that the -- are you also ruling that the search warrant was based upon probable cause?

THE COURT: Yes, ample cause.

MR. MARINE: And there is one that -- the jurisdiction aspect of the HE-2-P.

THE COURT: I think Brooklyn is the proper

At a Trial Term, Part 37 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, located at Civic Center, 360 Adams Street, Brooklyn, New York, on the day of May, 1978.

P R E S E N T:

HON. SYBIL HART KOOPER

JUSTICE OF THE SUPREME COURT

000396

----------X

THE PEOPLE OF THE STATE OF NEW YORK, : Kings County Indictment No. 3412/77

Plaintiff, :

-against- : (Superseding Kings County Indictment No. 3259/76)

SAMUEL LEIFER, :

Defendant. : ORDER

----------X

The defendant having, by notice of motion, supporting affidavit and memorandum of law dated February 17, 1978, moved this Court for an order:

a. dismissing the indictment pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, N.Y. Const. art. I,§6 and C.P.L.§210.20(1)(i) on the ground that the Special Prosecutor obtained the present indictment in retaliation for defendant's exercise of his right to trial and his refusal to become an informant;

b. dismissing the indictment pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(i) on the ground that the Special Prosecutor abused the Grand Jury process in order to obtain evidence to prosecute the indictment;

000397

c. dismissing the indictment pursuant to the Fourteenth Amendment to the United States Constitution, N.Y. Const. art. I, §11 and C.P.L. §210.20(1)(i) on the ground that the Special Prosecutor has prosecuted cases only where proprietary health related facilities are involved and has failed to prosecute cases where voluntary health related facilities are involved, and that such selective enforcement of the law constitutes invidious discrimination;

d. dismissing count one of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) on the ground that it fails to charge a crime;

e. dismissing counts two through seventeen of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) on the grounds that they fail to charge a crime, and that none of said counts allege facts with



sufficient precision to apprise defendant clearly of the conduct constituting the accusation;

000398

f. dismissing counts five, eight, nine, thirteen and fourteen of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) on the ground that they charge the same offense as count two;

g. dismissing counts six, ten, eleven, fifteen and sixteen of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) on the ground that they charge the same offense as count three.

h. dismissing counts seven, twelve and seventeen of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) on the ground that they charge the same offense as count four;

i. dismissing count eighteen of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) on the ground that it fails to charge a crime;

j. dismissing counts nineteen through thirty-eight of the indictment pursuant to the Fourteenth Amendment of the

United States Constitution, N.Y. Const. art. I, §11 and C.P.L. §210.20(1)(a) on the ground that the statute denies defendant equal protection of the laws;

000399

k. dismissing counts nineteen through thirty-eight of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) on the ground that the statute is void for vagueness.

l. dismissing counts nineteen through thirty-eight of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) on the ground that they fail to charge a crime;

m. dismissing counts twenty through thirty-eight of the indictment pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) on the ground that they charge the same offense as count nineteen;

n. dismissing counts thirty-nine and forty of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L §210.20(1)(a) on the ground that they fail to charge a crime;



o. dismissing count forty of the indictment pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, N.Y. Const. art. I, §6 and C.P.L. §210.20(1)(a) and (i) on the ground that it charges the same crime charged in count thirty-nine of the indictment, which carries a lesser penalty, and that election now by the Special Prosecutor to charge only the felony would be an abuse of discretion and a violation of defendant's constitutional rights;

000400

p. granting inspection of the Grand Jury minutes, testimony and instructions, and dismissing the indictment pursuant to C.P.L. §210.20(1)(b)(c) and the inherent and supervisory powers of this Court on the grounds that there is reasonable cause to believe that the Grand Jury evidence was legally insufficient, and that the Special Prosecutor deliberately and purposely failed to give proper instructions and exculpatory evidence to the Grand Jury;

q. directing the Special Prosecutor to serve and file a bill of particulars pursuant to C.P.L. §200.10 supplying the information required in the accompanying demand for particulars;

r. granting discovery pursuant to C.P.L. §240.20 supplying the items set forth in the accompanying request for discovery;

s. suppressing all oral statements made by defendant pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, N.Y. Const. art. I, §6, and C.P.L. §710.20(2) and (3) on the ground that such statements were involuntarily made, and were, in part, obtained by illegal electronic surveillance;

000401

t. suppressing all evidence impounded by Special Prosecutor and all evidence obtained pursuant to a search warrant, pursuant to the Fourth Amendment to the United States Constitution, N.Y. Const. art. I, §12 and C.P.L. §710.20 (1) and (4) on the ground that the first was seized under circumstances precluding admissibility at trial and the second as a result of evidence obtained by illegal electronic surveillance in violation of C.P.L. §710.20(2); and

u. granting such other and further relief as the Court deems proper in the circumstances;

And the motion having been opposed in part by the Office of the Special Prosecutor for Nursing Homes, Health and Social Services, by affirmation and memorandum of law dated March 21, 1978;

And the defendant having submitted a reply affidavit



ted April 11, 1978, and a supplemental memorandum of law dated ril 27, 1978;

000402

And oral argument having been heard before me on April 1978, by Max Wild, Esq. and Toni Robinson, Esq. on behalf of in Baum Levin Constant & Friedman, attorneys for the defendant uel Leifer, and by Special Assistant Attorney General Frank J. ine on behalf of the Office of the Special Prosecutor,

NOW, based upon these and all other papers and proedings heretofore had and filed herein, it is hereby

ORDERED, that Count Thirty-eight of the indictment be ismissed; and it is further

ORDERED, that all statements made by the defendant and ll other evidence obtained by the Special Prosecutor in connection with or arising out of the transaction between the defendant nd a grocery vendor on November 12, 1976 are suppressed; and it is further

ORDERED, that defendant's motion is in all other respects denied, except to the extent consented to.

ENTER.

J.S.C.



BEST COPY AVAILABLE

of the State of New York, Second Judicial Department, held in Kings County on September 24, 1979

HON. J. IRWIN SHAPIRO, Justice Presiding,
HON. JOHN P. COHALAN, Jr.,
HON. CHARLES MARGETT,
HON. M. HENRY MARTUSCELLO. } *Associate Justices*

The People of the State of New York,

Respondent,

v.

Samuel Leifer,

Appellant.

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Samuel Leifer,

defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered April 26, 1979;

and the said appeal having been argued by Max Wild, Esq., of counsel for the appellant, and argued by Arthur Weinstein, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, and it is further

ORDERED that this case is hereby remitted to the Supreme Court, Kings County, for further proceedings pursuant to CPL 460.50 (subd 5).

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

# State of New York
# Court of Appeals

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

SAMUEL LEIFER

CERTIFICATE DENYING LEAVE

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
November 9, 1979

Jacob D. Fuchsberg
Associate Judge

*Description of Order: Order of the Appellate Division, Second Dept., dated September 24, 1979 affirming judgment of the Supreme Court Kings County rendered April 26, 1979

Supreme Court, U. S.
FILED
MAR 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1979

No. 79-1215

SAMUEL LEIFER,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

**October Term, 1979**

**No. 79-1215**

SAMUEL LEIFER,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### Jurisdiction

Petitioner Samuel Leifer invokes this Court's jurisdiction under 28 U.S.C. §1257(3) in support of an application for certiorari to the New York Court of Appeals based upon a certificate entered November 9, 1979, by a single judge of that court, denying petitioner permission to appeal to the Court of Appeals from a decision of the Appellate Division, Second Judicial Department. As set forth in Point I of its argument, respondent submits that this Court

lacks jurisdiction because the Court of Appeals has not rendered a final judgment or decree within the meaning of 28 U.S.C. §1257.

## Questions Involved

1. Whether a prosecutor may continue a grand jury investigation of, and procure a superseding indictment against, an individual who has offered to plead guilty to a pending indictment but has declined to cooperate with the prosecutor's investigation of other persons and matters; and if so, whether any objections to the felony indictment subsequently returned are waived by his plea of guilty to all the additional counts.

2. Whether the consent of informants to record their conversations with a prospective defendant is invalid, and the recordings rendered inadmissible under 18 U.S.C. §2510 or the Constitution, if the informants' consent was motivated by their desire to minimize the possible sanctions for their own criminal conduct.

3. Whether a search warrant procured in part upon information supplied by informants is rendered invalid, as a matter of Constitutional law, where the informants have cooperated in order to minimize the possible sanctions for their own criminal conduct.

4. Whether police officers executing a search warrant are obligated, under the Constitution, to display the warrant to every person on the premises in which the search is being conducted, whether or not their authority to conduct the search is questioned.



## Statement of the Case

In 1975, the State of New York authorized its Attorney General to conduct an intensive civil and criminal investigation into the rampant corruption within the State's nursing home industry. *Sigety* v. *Hynes,* 38 N.Y.2d 260 (1975), *cert. denied sub nom. Kent Nursing Home* v. *Office of Special Prosecutor,* 425 U.S. 974 (1976). As part of that investigation, on November 9, 1976, a Kings County Grand Jury returned a 19-count indictment against petitioner, Samuel Leifer, an owner of the River Manor Health Related Facility. The indictment charged that from 1974 to 1976 Leifer had regularly received kickbacks, amounting to 25 per cent of the facility's purchases, from Frohlich and Newell Foods, Inc. R. 3-23, 201.* Frohlich and Newell, who faced potential criminal prosecution themselves, had cooperated with the investigation, consented to have their conversations with Leifer tape-recorded, and testified before the grand jury. R. 201-02, 355.

The grand jury's investigation of Leifer did not, and was not intended to, end with the return of that indictment. The filing of that instrument served to prevent the two-year statute of limitations on those misdemeanor charges from expiring while the investigation of various felony offenses continued. R. 266; *see* N.Y. Crim. Pro. L. §§1.20, subd. 17, 30.10, subd. 2 (McKinney's). The Attorney General's office immediately informed Leifer's attorneys that the grand jury's investigation was continuing and that a superseding indictment charging Leifer with more serious offenses was actively being contemplated. R. 266-67.

* "R." connotes the record on appeal to the Appellate Division, Second Department.

During the period immediately following the original indictment, a search warrant was obtained for a notebook which Newell described having seen Leifer use over the years to record the kickbacks which he received. R. 186, 198-99. On November 12, 1979, police officers successfully executed the search warrant at the same time they arrested Leifer on a separate arrest warrant based on the indictment. R. 259; *see* N.Y. Crim. Pro. L. §210.10, subd. 3.

Leifer's attorneys then approached the Attorney General's office and offered a plea of guilty to various misdemeanors. R. 243-44, 267. During the ensuing plea negotiations, the prosecutor asked whether Leifer would be willing to supply information about other corrupt individuals in the nursing home industry; this prospect was merely discussed among various possible dispositions and the prosecutor never made any firm offer to terminate the investigation and accept the misdemeanor plea in return for Leifer's cooperation. R. 156, 243-44, 267. Leifer steadfastly refused any cooperation, his offer of a misdemeanor plea was rejected, and the grand jury's investigation continued. R. 156, 244-45.

As the investigation progressed, various other vendors came forward to testify that they, too, had paid Leifer kickbacks. R. 270. A substantial quantity of subpoenaed books and records relating to Leifer's business, many of which he had previously resisted yielding, were introduced before the grand jury over the ensuing months. R. 268-69. Leifer's tax returns were eventually produced and, in October of 1977, the person who prepared them finally became available to testify. R. 269.



At that point, nearly one year after the original indictment, the grand jury's investigation concluded with the filing of a superseding indictment—which included 19 new felony counts charging the offering of false instruments for filing, the falsifying of business records, attempted grand larceny and a misdemeanor count of tax evasion, as well as the original counts of kickback-receiving.* R. 82-129, 269.

Leifer then moved to dismiss the superseding indictment on the ground, among others, that it was brought to "punish" him for not becoming an informant; in the alternative, he moved to suppress the tape recordings of his statements to Frohlich and Newell on the ground that his attorney believed that Frohlich and Newell did not voluntarily consent to the recording and to suppress the notebook on the ground that their lack of consent tainted the probable cause which existed for the search warrant. R. 34-36, 59-61. Upon the entry of an order denying the foregoing relief, without a formal opinion, Leifer entered a plea of guilty to all 39 counts of the indictment and was sentenced, on April 26, 1979, to a term of six month's imprisonment on each of the 19 felony counts, to be served concurrently, and to pay a fine of $1000 on each of the 20 misdemeanor counts. R. 296-502, 633-90. The judgment of conviction was unanimously affirmed, without opinion, by the Appellate Division, Second Department, on September 24, 1979 (71 A.D.2d 1007), and on November 9, permission to appeal to the New York State Court of Appeals was denied by Associate Judge Jacob D. Fuchsberg (48 N.Y.2d 802).

Petitioner is scheduled to be released from prison on March 12, 1980.

---

* One additional kickback-receiving count was returned but dismissed on pretrial motion.

# ARGUMENT

## POINT I

**Certiorari to the New York Court of Appeals does not lie in the absence of a final judgment or decree by that court.**

Petitioner seeks a writ of certiorari to review what he contends is a final judgment of the New York State Court of Appeals entered November 9, 1979. The judgment to which he refers is merely a certificate, issued by a single judge, denying petitioner's application to appeal from the affirmance of his conviction by the Appellate Division. The grant or denial of such an application is, under section 460.20 of the New York Criminal Procedure Law, a matter within the sole discretion of the judge to whom the application is assigned and accordingly is not a "final judgment or decree" on the merits by "the highest court of the State in which a decision could be had" within the meaning of 28 U.S.C. §1257. *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 678, n. 1 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 160 (1954); *American Railway Express Co.* v. *Levee,* 263 U.S. 19, 20-21 (1923).



## POINT II

**The issues which petitioner seeks to raise are not presented by the record.**

### A. The State court explicitly found that the superseding indictment was not brought to punish petitioner for refusing to cooperate with the Attorney General's office.

Petitioner contends that the New York Attorney General unconstitutionally sought and obtained a superseding indictment against petitioner, based on the same evidence and for conduct originally charged as misdemeanors, in order to "punish" petitioner for refusing, on "religious grounds," to become an informant. Petition at 2-3, 12-15. His factual premises are unsupported by the record and are contrary to the explicit findings of the State court.

First, Leifer's contention that the second indictment was based on the same evidence, and charged the same conduct, as did his original indictment is wrong. The trial prosecutor, Special Assistant Attorney General Frank J. Marine, submitted statements to the State court, under oath, in which he not only denied that, but carefully chronicled for the court all the evidence of felonious conduct which became first accessible to the grand jury after the original indictment. R. 243-44, 266-70. This evidence included books and records, the testimony of various witnesses, and the "smoking gun"—the notebook in which petitioner recorded his illegal kickbacks. The superseding indictment itself supports Mr. Marine's affirmation: the additional charges are not, as petitioner implies, for receiving kickbacks but rather for the falsification of business rec-

ords, the submitting of false documents to the State, attempted larceny, and tax evasion. R. 82-103, 127-28.

Second, petitioner falsely contends that the superseding indictment was procured because he refused to become an informant. Mr. Marine also denied this under oath, emphasizing that the prosecutor always intended, and had told Leifer's attorneys "from the very beginning," that additional charges were being pursued with the view toward just such a superseding indictment. R. 243, 266. It was Leifer who tried to avoid this by offering to enter a misdemeanor plea. R. 243-44. Mr. Marine stated unequivocally that petitioner's cooperation with the investigation was never demanded as a condition of allowing him to enter such a plea, and that the prosecution sought the superseding indictment "not * * * to punish the defendant for his refusal to provide information about other corrupt individuals" but "because the evidence justifies the charges." R. 243-44. The hearing judge credited Mr. Marine's statements and found that the superseding indictment was not procured to punish petitioner for refusing to cooperate: "I do not believe it was punitive action taken on the part of the prosecutor * * *. I think he acted properly." R. 353.*

Moreover, as the hearing court noted, even assuming that the superseding indictment had been sought because

* Petitioner's contention that his refusal to cooperate was based on some unspecified "religious conviction" (petition at 14) was never addressed by the State court because Leifer's motion papers proffered no reason for his refusal to cooperate. R. 35, 156. Petitioner's "First Amendment" question (petition at 2-3) was thus never presented to or decided by the State courts. *Compare* R. 24, 396. Although counsel has no hesitation to go outside the record when it suits him (see petition at 6), he has yet to submit any proof that Leifer's religion requires him to protect other criminals.



appellant had rejected the prosecutor's entreaties during plea negotiation—instead of the other way around—no constitutional rights were violated. R. 341. In *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978), this Court held that a prosecutor may reindict a defendant for more serious charges, even upon the same conduct, because the latter refuses to plead guilty to the original charge. The Court held that "in the give and take of plea bargaining there is no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363. Petitioner's attempt to distinguish *Bordenkircher* on the ground that that case "specifically recognized that the result would be different" if the defendant were asked to become an informant (petition at 13) is totally fanciful. What the Court noted in *Bordenkircher* was merely that that case did not invoke an offer of adverse or lenient treatment for some person other than the accused. *Id.* at 364 n. 8. Neither, obviously, does this one.

Finally, any objection to the superseding indictment as "punitive" was waived by petitioner's guilty plea to all the additional counts. In the absence of a statutory preservation, a guilty plea constitutes a "break in the chain of events which has preceded it in the criminal process" and "bars the later assertion of constitutional challenges to the pretrial proceedings." *Lefkowitz* v. *Newsome,* 420 U.S. 283, 289 (1975); *Tollett* v. *Henderson,* 411 U.S. 258, 267 (1973). There is not the slightest reason to believe that the State appellate court violated basic New York law on this point [*People* v. *LaRuffa,* 34 N.Y.2d 242 (1974), *cert. denied* 423 U.S. 917 (1975)] to credit petitioner's *ipse dixit* "reserving" of his appellate rights (petition at 11).

**B. The State court found the informants' consent to the recording of their conversations with petitioner to have been established by uncontroverted evidence.**

The petitioner next contends that the Constitution places upon the States the burden of proving that an informant consented to have his conversation with the defendant recorded. Petition at 15-19. This issue was never squarely presented to the courts below, at least as a matter of Constitutional law, and the hearing court found no necessity to apportion the burden of proof because:

> Everything that's been presented to me, and there's no evidence to the contrary whatever, except mere speculation, everything that's been presented to me indicates that the special agents, as you call them, informants, whatever, voluntarily participated in this matter. I have not the slightest indication that their cooperation was less than voluntary. The fact that they were faced with hard choices, people are facing every day.

R. 357. The evidence to which the court was referring was, evidently, Newell and Frohlich's testimony before the grand jury; Newell's affidavit, which stated that he was cooperating when he wore the recording device; and Mr. Marine's statement, under oath, confirming this. *See* R. 185, 259, 354-56.

In contrast, all that appellant submitted was a statement by one of his attorneys of her "belief" that the informants did not consent, solely "based on the fact that Newell and Frolich were caught by the prosecutor while participating in a rebate scheme with various nursing homes they supplied." R. 60. As the hearing court recognized, this fact would in no way negate consent: "Perhaps, had they not



[consented], they might have been subject to certain sanctions with regard to their own behavior, perhaps, but they had a choice. * * * They acted on advice of counsel." R. 355. Thus neither an evidentiary hearing nor the fixing of the burden of proof thereat was necessary: the court was willing to assume that Newell and Frohlich were motivated for the reason petitioner alleged and to resolve the purely legal question whether such a motive vitiates consent.

The court properly answered that question in the negative. Self-interest is hardly incompatible with voluntariness. *See, e.g., United States* v. *Hodge,* 539 F.2d 898, 904-05 (6th Cir. 1976) *cert. denied sub nom. Robertson* v. *United States,* 429 U.S. 1091 (1977) (hope of leniency); *United States* v. *Silvia,* 449 F.2d 145 (1st Cir. 1971) *cert. denied* 405 U.S. 918 (1972) (promise of leniency; *see, also, United States* v. *Horton,* 601 F.2d 319, 321-22 (7th Cir. 1979) and cases in the 4th, 5th and 6th circuits cited thereat (favorable sentence recommendations, payments, protective custody, etc).

Petitioner, however, seemingly urges that the State must show consent to have been utterly spontaneous, if not altruistic, and that the proper analogy is to the waiver of a basic constitutional right. Petition at 18. But, as Judge Friendly has explained, the burden of showing an informant's consent, even if it is to be placed on the prosecution, is an "easy" one to meet precisely because the self-interest of the informant makes his consent "very different" from a defendant's waiver of a constitutional right:

> [T]he extent of proof required to show that an informer consented to the monitoring or recording of a telephone call is normally quite different from that

> needed to show consent to a physical search, whether by the defendant himself or by some person in a position to give an effective one. In cases involving physical search, the person alleged to have consented is doing something apparently contrary to his own interests or to those of another who often is in some way connected with him. An informer's consent to the monitoring or recording of a telephone conversation is an incident to a course of cooperation with law enforcement officials on which he has ordinarily decided some time previously and entails no unpleasant consequences to him.

Thus, the court held, the government is not obligated to show anything more than "that the informant went ahead with a call after knowing what the law enforcement officers were about." *United States* v. *Bonanno,* 487 F.2d 654, 658-59 (2d Cir. 1973). The record here unequivocally shows that Frohlich and Newell "went ahead" knowing they had something to gain and nothing to lose by becoming informants. It may well be that they would not have done so had they not themselves been caught by the prosecutor, but the Constitution* simply does not require that their motives be pure.

**C. The evidence seized pursuant to the search warrant was not the fruit of the recorded conversations.**

Petitioner next contends that the notebook should have been suppressed because the warrant which authorized its seizure was based on the supposedly involuntarily recorded conversations. Petition at 19-20. In fact, it was based on an affidavit by Newell, who swore that he had been paying

* Petitioner now also invokes 18 U.S.C. §2510 (petition at 3, 20), never having done so in the State courts (*see* R. 28). In any event, the statute does not affect the principles cited above.



Leifer kickbacks every month since the middle of 1974, and had seen Leifer record those kickbacks into his notebook on "almost every occasion" during those years; Newell knew the location of the notebook and described it in detail in his affidavit. R. 184-87. Newell had consented to wearing a recording device only on September 3 and November 3, 1976, and the supplementary affidavit of a police officer who monitored these tapes merely confirmed a part of what Newell swore of his own person knowledge. R. 185, 186, 188-90. Thus, there was, and can be, no contention that Newell's affidavit was the fruit of the taped conversation, and therefore even if he had not consented to the recording the application for the warrant was amply supported by untainted probable cause. *Wong Sun* v. *United States,* 371 U.S. 471, 491 (1963).

**D. The failure to physically serve the warrant was not raised as a ground for suppression.**

Finally, petitioner contends that the police officers who executed the warrant for the notebook acted unconstitutionally in not displaying the search warrant to Leifer and his receptionist. Petition at 20-21. In moving to suppress the introduction of the kickback book, petitioner never contended that the manner in which the warrant was executed violated either the Constitution or any statute. *See* R. 61. Even on appeal, he contended merely that there was a violation of New York Crim. Pro. L. §690.50 (brief at 37-38) but, as respondent pointed out in the Appellate Division, that statute requires that a police officer executing a warrant merely "give notice of his authority and purpose" to an occupant of the premises, and that he physically display the warrant only "upon request." *Id.* at subd. 1. Petitioner

never disputed that the police properly identified themselves to him* and conceded that they told him that they had a search warrant. R. 240. There is no allegation that anyone asked to see the warrant and no contention that the statute is unconstitutional. Thus there is no reason for this Court to grant certiorari to consider, for the first time, whether the Constitution requires not merely that a search warrant be based on probable cause (U.S. Const. Amend. IV), but that it must also be thrust in the face of anyone who happens to be present when it is executed.

## Conclusion

**The petition should be denied.**

Respectfully submitted,

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* Petitioner did allege that the police initially deceived his receptionist in order to gain access to Leifer personally and to the office in which the evidence was located. R. 240. As noted above, petitioner's motion to suppress alleged no impropriety in the execution of the warrant. R. 61. Assuming that the State court, sua sponte, addressed the issue, it presumably held either that the statute did not require that the receptionist be given adequate warning to alert her employer—and enable him to flee or destroy the evidence; or else that no right of his was violated.